

## Expert Analysis

# Fighting ADA Website Suits, Without Federal Guidance

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Three years ago, we wrote for Law360 that given the lack of formal guidance on website accessibility under the Americans with Disabilities Act, “www” might as well stand for the “Wild Wild West.” Despite the large number of lawsuits — thousands in the last few years alone — there are still no bright-line rules that retailers can follow in order to avoid being targeted.

## Background on Accessibility Lawsuits

These cases are not new. In 2006, for example, the National Federation of the Blind brought suit against Target Corp., claiming that the retailer violated Title III of the ADA because blind people could not access much of the information on the retailer’s website, nor purchase anything from the retailer’s website independently. In September 2008, the parties settled for a \$6 million class reward. In August 2009, the court awarded an additional \$3.7 million in attorneys’ fees and costs.

The most recent wave of accessibility lawsuits has been based on the same basic premise: By failing to make websites accessible to blind or deaf visitors, the websites violate Title III of the ADA, which imposes upon places of public accommodation an obligation to “furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities.” Although these lawsuits have been filed across the country, the vast majority are in New York, California, Florida and Pennsylvania under the ADA and corresponding state laws.

In New York, for example, plaintiffs have sued under the New York State Human Rights Law and, where available, the New York City Human Rights Law. In California, plaintiffs often invoke the Unruh Civil Rights Act and, less frequently, the Fair Employment and Housing Act.

The past year has witnessed another explosion of website accessibility cases, with more than a thousand such lawsuits filed in the first half of 2018. A substantial portion of those were filed in New York, and are the product of two plaintiffs firms that are relatively new on the scene. Between November 2017 and August 2018, those two firms filed more than 450 website accessibility lawsuits in the Southern and Eastern Districts of New York.

The majority of these accessibility lawsuits involve retailers of some variety (including restaurants, banks and financial institutions), and a large percentage of them settle shortly after they are filed (before filing a response or attending a case management conference). It is important to note as well that many of these claims are initiated by a letter and result in settlements before a case is even filed, which makes precise tracking of the volume of claims impossible with any degree of accuracy.

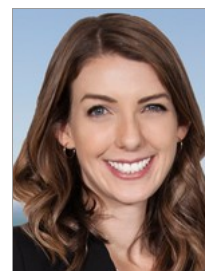
Suffice it to say, however, that by now, just about every retailer in the country has faced at least one of these claims — and it’s not unusual for one retailer to have to field multiple claims. It is therefore no wonder that the frustration with these website accessibility claims within the retail industry is palpable, and growing every day.



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## Variations on Traditional Web ADA Claims

While most of the attention so far has been on website accessibility, new targets are emerging. Indeed, we are seeing offshoot trends in accessibility litigation that are especially relevant to retailers, particularly those with large multidimensional digital footprints (e.g., websites, mobile apps and digital media).

A number of plaintiffs firms are breaking down a company's digital presence into separate elements in order to pursue multiple accessibility claims. For example, a plaintiffs firm may challenge the company's use of inaccessible PDFs, only to then subsequently pursue the use of videos without close captioning, then job application systems, and then mobile apps. This approach potentially gives plaintiffs firms several bites at the proverbial apple, enabling them to generate multiple litigation opportunities from the same company.

As noted above, some retailers have been targeted for allegedly failing to make their web-based job application systems accessible to sight-disabled applicants. The demand letters and complaints allege that the plaintiffs tried to apply for a job with the retailer (rather than buy a product), but could not do so because the system was not accessible to the blind. For these claims in California, rather than Title III of the ADA or the Unruh Act, these cases instead invoke the Fair Employment and Housing Act, California's equivalent to Title I of the ADA.

We are also seeing plaintiffs firms issuing demand letters to retailers alleging (oftentimes, incorrectly) that the retailer's mobile apps are inaccessible, and therefore violate the ADA. What is particularly concerning about this development is that in many instances, the retailer had already settled a website accessibility action with the same plaintiffs firms. These new claims against the same retailers appear to be a brazen attempt at double-dipping that potentially violates the terms of the prior agreements — not to mention the retailers' understanding that in entering into prior settlement agreements, they were also buying peace.

There are important steps retailers can take to proactively protect against some of these new trends:

- Evaluate your mobile apps and job application websites. These appear to be the next major targets for plaintiffs firms. Take measures to understand who owns and operates your mobile apps and job boards, and review your agreements with the subcontractors and developers of those platforms to ensure that you: (a) are passing the obligation of ADA compliance down to the them; and (b) have reviewed your indemnification rights.

- Approach accessibility settlement agreements with a broad perspective in defining the scope of the agreement to cover your entire digital presence, including your mobile apps.

## The Lack of Statutory or DOJ Guidance

For retailers looking for someone to blame for the current environment, the U.S. Department of Justice is the best place to start. In 2010, the DOJ announced that it would issue new regulations under Title III of the ADA to address website accessibility. The regulations were expected to clarify the technical standards applicable to web accessibility, establish defenses and reduce the amount of litigation against allegedly noncompliant businesses.

But despite repeatedly reiterating its intent to provide clarity, DOJ never delivered on its promise of regulatory certainty, and, in early 2018, exited the field completely by demoting website accessibility to its "inactive" list, which consists of regulations that have no known place in the agency's planned rulemaking.

## Recent Decisions Against Retailers

Responsibility also lies with the courts. Over the past year or so, courts have issued a number of decisions related to website accessibility that are unfriendly to retailers. In particular, courts have rejected a number of defenses that defendants raise in response to such claims.

*Gil v. Winn-Dixie Stores Inc.*[1] was the first website accessibility case to go to trial (a bench trial). The defendant lost. The court found that the \$250,000 cost to remediate Winn Dixie's website was not an "undue burden," and ordered Winn Dixie to make its website conform to the Web Content Accessibility Guidelines 2.0 AA. Notably, and of significant import to retailers facing such claims, the court did not limit the reach of its order to only those portions of Winn-Dixie's website that it operates internally.

The court specifically held Winn-Dixie responsible for the entire website's lack of accessibility, notwithstanding the fact that portions of the website are operated by third-party vendors such as Google and American Express. The court explained that "[m]any, if not most, of the third-party vendors may already be accessible to the disabled and, if not, Winn-Dixie has a legal obligation to require them to be accessible if they choose to operate within the Winn-Dixie website."

In *Gorecki v. Hobby Lobby Stores Inc.*,[2] the district court denied Hobby Lobby's motion to dismiss a website accessibility lawsuit on due process and primary jurisdiction grounds. Hobby Lobby argued that because the DOJ had not promulgated final regulations under Title III setting forth specific accessibility standards, it would violate due process to grant injunctive relief, since Hobby Lobby did not have sufficient notice of the need to make its website accessible. Hobby Lobby also argued that the action should be dismissed under the primary jurisdiction doctrine, which, if applied, would preclude the court from ruling on website accessibility issues until DOJ promulgates and adopts regulations.

The court in *Gorecki* rejected each of Hobby Lobby's arguments. The court emphasized that DOJ has articulated its position that Title III has required website accessibility for over 20 years, and that regardless, it has always required "full and equal enjoyment" and the provision of "auxiliary aids and services for 'effective communication.'" The court also rejected the argument that the primary jurisdiction doctrine should apply, stating that the case could be handled like other Title III matters, and that invoking the doctrine could needlessly delay potentially meritorious claims.

In *Haynes v. Hooters of America*,[3] the Eleventh Circuit rejected Hooters' argument that the plaintiff's claims for declaratory and injunctive relief under the ADA were moot, due to the fact that Hooters had entered into a remediation plan as a result of a prior settlement with a different plaintiff in an almost identical earlier-filed suit. This circuit court decision wiped out a host of favorable (and eminently reasonable) decisions in the Southern District of Florida dismissing accessibility claims as moot when the defendant was already committed to improving the accessibility of its website pursuant to a prior settlement.

In *Thurston v. Midvale Corp. d/b/a The Whisper Lounge*,[4] a California state court granted summary judgment for a plaintiff under California's Unruh Civil Rights Act, despite the presence of an email and phone number that the plaintiff could have used. The court found that "the provision of an email or phone number does not provide full and equal enjoyment of Defendant's website ... but rather imposes a burden on the visually impaired to wait for a response via email or call during business hours rather than have access via Defendant's website as other sighted customers."

The decisions have not all been retailer-unfriendly, however. For those retailers holding out hope that courts will recognize that a "mootness" defense is the best way to distinguish between valid claims that serve a public purpose and pure nuisance claims, there are a couple positive decisions that are potentially persuasive.[5] And for those wishing that the notion of a "reasonable accommodation"

would have some meaning in the website accessibility context, especially while remediation is in progress, there is at least one favorable decision in California.[6]

## **WCAG 2.0 and 2.1**

In the absence of formal regulations, retailers are forced to look to cases, consent decrees and statements of interests for direction on how to comply with the ADA. Fortunately, all of those sources have recognized the W3C Web Content Accessibility Guidelines 2.0 Level A or AA as the governing standard for website accessibility.[7]

WCAG 2.0 calls for companies to provide text alternatives for nontext content; provide captions and other alternatives for multimedia; provide labels and guidance for forms; make all functionality available from a keyboard; give users enough time to read and use content; help users navigate and find content; make text readable and understandable; and maximize compatibility with user tools, particularly assistive technologies such as screen readers.

In June 2018, the W3C issued the Web Content Accessibility Guidelines 2.1 (WCAG 2.1). These updated guidelines expand coverage of mobile accessibility, and add provisions in the areas of low vision, and cognitive and learning disabilities. WCAG 2.1 has not yet been adopted by courts, but we expect that it is only a matter of time before it becomes the prevailing accessibility standard, and encourage retailers to adopt it going forward.

The consistent adoption of WCAG 2.0 (or 2.1) provides retailers with some measure of guidance as they seek to comply with their obligations under the ADA and related state laws. But unfortunately, the Web Content Accessibility Guidelines are just that — guidelines — and thus incorporate enough ambiguity and case-by-case analysis that compliance is both difficult to achieve, and challenging, if not impossible, to prove in a motion to dismiss or on summary judgment.

Thus, for practical purposes, even “compliance” with WCAG 2.0/2.1 is not an effective defense to the current crop of website accessibility claims, because it does little to dissuade plaintiffs firms from filing suit in the first place. As long as plaintiffs firms are willing to go away for less than the cost of a motion to dismiss and/or discovery, suits will continue to be filed against companies who will likely continue to settle those matters, regardless of whether the company’s website is WCAG 2.0/2.1 compliant or not.

## **Current Political Efforts**

In order to solve this crisis, what retailers need are defenses that would preclude and/or dissuade plaintiffs firms from filing website accessibility lawsuits against companies that have undertaken or are in the process of undertaking efforts to achieve the goals of the ADA.

This could take a number of forms including but not limited to: (a) a notice period and opportunity to cure any alleged deficiencies in website accessibility; (b) a “mootness” defense available to companies that have already settled the same or similar accessibility claims; (c) a “good faith” defense for those companies that have voluntarily engaged in remediation; and (d) a technical and legal standard that is easier to test or prove than 100 percent compliance with WCAG 2.0/2.1.

Given the unfavorable decisions that have been issued by many courts, it is perhaps unsurprising that attention has turned back to a political solution in the form of DOJ regulations. To that end, there have been a number of recent efforts to encourage the DOJ to act on website accessibility.

On June 20, 2018, 103 members of the U.S. House of Representatives sent a letter to U.S. Attorney General Jeff Sessions urging the DOJ to “state publicly that private legal action under the ADA with respect to websites is unfair and violates basic due process principles in the absence of clear statutory

authority and issuance by the department of a final rule establishing website accessibility standards.” The letter also asked the DOJ to “provide guidance and clarity with regard to website accessibility under the ... ADA.”

On July 19, 2018, 19 state attorneys general sent a letter to Attorney General Sessions urging the DOJ to provide clear guidance regarding website accessibility under the ADA. Emphasizing that “[t]his void in the law has led to unnecessary lawsuits,” the group requested that the “DOJ issue a proposed rule to provide exact standards for web accessibility, and provide any guidance in the interim.”

On Sept. 4, 2018, six U.S. senators sent a letter to Attorney General Sessions urging the DOJ to resolve the uncertainty regarding website accessibility because “for the ADA to be effective, it must be clear so that law abiding Americans can faithfully follow the law.” The letter noted that the DOJ has “not issued guidance or regulations to provide clarity, and conflicting court decisions have created even more confusion,” an “opportunity” which plaintiffs attorneys are “exploiting” for “personal gain.”

## Conclusion

Recent decisions against retailers should serve as a reminder that the best defense is, and has always been, to become ADA compliant. Until more formal or specific guidance becomes available, retailers should evaluate their websites, mobile apps and other digital platforms and media under the WCAG 2.0 and 2.1 Guidelines and make any necessary changes as soon as possible. Given the lack of clarity, companies should also consult with counsel with experience in this area to explore what other changes they should consider to protect themselves.

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[1] *Gil v. Winn-Dixie Stores Inc.*, No. 16-cv-23020, Dkt. No. 63 (S.D. Fla. June 13, 2017) .

[2] *Gorecki v. Hobby Lobby Stores Inc.*, Case No. 2:17-cv-01131-JFW-SK (C.D. Cal. June 15, 2017).

[3] *Haynes v. Hooters of America LLC*, --- F.3d ---, 2018 WL 3030840 (2018).

[4] *Thurston v. Midvale Corp. d/b/a The Whisper Lounge*, Case No. BC663214 (Cal. Super. Ct. May 21, 2018).

[5] See, e.g., *Carroll v. New People's Bank*, Case No. 1:17-cv-00044 (WD Va. April 5, 2018) (agreeing with the defendant that the plaintiff's “claim is now moot based on its voluntary upgrades made to the website after this action was filed”).

[6] See *Robles v. Dominos Pizza LLC*, Case No.: 2:16-cv-06599-SJO-FFM (C.D. Cal. Mar. 20, 2017) (dismissing a case on the same grounds rejected in *Gorecki*, and noting that businesses might be able to provide access to a website's services via alternative means, e.g., a toll-free phone number). *Robles* is currently on appeal to the Ninth Circuit with oral argument scheduled this month.

[7] See e.g., *Gil v. Winn-Dixie Stores Inc.* (adopting WCAG 2.0 as part of the injunctive relief granted following jury trial).